Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JOHN J. WALSH

Petitioner

v.

GALE NORTON, SECRETARY OF THE INTERIOR

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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The questions presented for review in the terms and circumstance of the case are whether or not:

(a) The respondent controls the composition of its competitive civil service work force by rendering unlawful consideration to proscribed factors.

(b) The lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Such concerns the apparent judicial selective omission of consideration of material circumstances, genuine issues of material fact and this Court's relevant precedents as done by the lower courts in the rendering of their erroneous decisions.

(c. The Federal actor lacked the lawful authority to implement its affirmative action/diversity plan.

(d) The respondent's diversity/affirmative action plan was invalid.

(e) This instant case's selection process was unlawfully discriminatory.

(f) The respondent acted in bad faith.

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JURISDICITION

The Court of Appeals Decision: January 10, 2003 and the denial date of the timely petition for rehearing: April 22, 2003 as at Appendix E.

On July 23, 2003 and in application No. 03A59 the time extension to file this petition was granted to and including August 20, 2003. On August 28, 2003, by letter, the date for resubmission included October 28, 2003. On November 4, 2003 by letter the date for resubmission included January 3, 2004.

The Court's jurisdiction is invoked under 28 U.S.C. at 1254 (1),

PROVISION OF LAW AND TREATIES INVOLVED

As at Appendix G: the Constitution of the United States and emanation therefrom and The Universal Declaration of Human Rights.

STATEMENT OF THE CASE

This case stems from the initial employment discrimination claim filed by petitioner. (DE 25's Ex. 1 as the Report of Investigation (ROI) Ex. 2 therein)

Therein petitioner states:

> "As precluded from inclusion into and therefore as a non-member of any Affirmative Action beneficiary group...(complainant) has been discriminated against regarding merit based objective consideration for multiple upward mobility employment opportunities. ...As it is known by statistical analysis and as advocated by the Department Secretary, that members of Affirmative Action...groups receive preference as a matter of official policy: this results in discrimination against non-preferred...applicant..."

Thereby, petitioner maintains that the respondent, in it's quest for the in effect mandated achievement of diversity as a matter of official policy; unlawfully controls the composition of the competitive civil service via abuse of process. (City of Richmond v. J.A. Croson)

As regarding overall diversity goals, (DE 18 at 39; "strategic Plan", DE 36-Exhibit No. 162) "and that they expect results...and...he means business...", (DE 25's Gov. Exhibit 3 at 32) the defendant engages in analysis of the occupational fields used in its endeavors and the qualification requirements for entry therein, in conjunction with the distinct qualification attainment levels of the separate protected groups that comprise the total workforce.

As is common knowledge, such statistical analysis reveals the differences existing between the Civilian Labor Market (CLM) and the Civilian Labor Force (CLF) and how the composition of the two sets are not proportionally interchangeable as regarding the distinct protected groups. As by definition, the CLM is different from the CLF. (DE 36's exhibit No. 161—

http:11www.doi.gov/diversity/98doi16/sld 001.htm, DE 25's go. Exhibit 3 at 34, DE 39 at 16, 17, DE 32 at 2)

Nevertheless, as proclaimed in the public domain, the respondent sets its overall diversity goals at a level that exceeds CLM proportional representation, while strongly advocating diversity achievement levels that even exceed the CLF representations as done via motivational incentives and supervisory level performance plan evaluations. (Appellant's br. At 3, 4, 8, DE 25's gov. exhibit 3 at 31-34, DE 39 at 13-15, DE 22 at 8, 10)

In sum, for purposes of overall diversity goal achievement and due to the different levels of qualifications attainment that exist between the protected groups as pertaining to the various occupational fields; the respondent by design thereby disproportionately over-represents defined affirmative action/preference eligible protected group members in the occupational fields that are less stringent and/or that are deliberately more ambiguous in regards to qualification requirements for entry therein. (DE 25's Ex. 1: ROI Ex. 4 at 22, 26-30, id. Ex 8 at 11, 12, 18, appellant br. At 8, DE 39 at 16)

Such preferential placement is facilitated by the Federal actor's defeasant role as indicated by its emphasis of diversity goal achievement as to trump Civil Rights Act law. (Affirmatio unius exlusio alterius) The means for the accomplishment of such lies in its supplied but nevertheless abused authority as a "delegated examining unit". Bearing witness to same is the respondent's non-use of the standard civil service Administration Careers With America, (ACWA) test, which is still valid, unlike its predecessor the PACE test, that the respondent's EEO director is selectively confused/ignorant about as indicated by the distorted content of Appendix F. Additionally, the respondent disregards the Office of Personnel Management's (OPM) controlling qualification standards, (appellant's br. At 39-41) but adheres to : "while maintaining a culturally diverse workforce" as a matter of official "Placement Policy" (DE 25's Ex. 1; ROI's

Ex. 21 at 2), and does so by means that are contrary to the EEOC's "Uniform Guidelines on Employee Selection Procedures"; 29 CFR. (DE 39 at 10, 11, DE 27 at 15)

Consequently, the non-minority male group, as the only "protected" group precluded from receiving eligibility status as an affirmative action beneficiary group, is via the abuse of the myriad of inofficiously designed application and selection processes; unlawfully disfavored as regarding entry into the particular fields and/or grade levels of positions that the respondent "targets"/seeks to place its preferred group members into. (DE 39 at 3, 10-12, DE 22 at 14)

Thus, the collective burden of affirmative action/preference programs is inherently concentrated. Moreover, the affects of such preferences, that in the past have been said to be of a diffuse nature, are nonetheless primarily concentrated in particular fields and levels. (DE 22 at 14) Or as stated on petitioner's same aforementioned initial employment discrimination complaint:

"An objective evaluation of (petitioner's) application(s)...in the Department will indicate that measurably lesser qualified institutionally preferred...applicant(s) were selected. This exists...notwithstanding the fact that...preferred...were disproportionately over represented in the same fields or same grade levels that...(petitioner) pursued employment in."

Accordingly, petitioner "views the "number one critical element" as pertaining to diversity achievement and maintenance as measured on management's performance evaluation plans" as being related to the legal concept of "natural and probable consequences" that are manifest in results as outlined in the above. (DE 39 at14)

Mindful of same national scale revelations, the respondent limited compelled disclosure of itself to the specific locale where the dispute arose. Nevertheless, as regarding the specific locale documents that pertain to genuine issues of material fact and that were placed on the court's record, the same record in its entirety was not

supplied to petitioner by respondent's counsel as required. (Appellant's br. at 8, 17). Moreover, review of the court's record on file shows that omitted/non-supplied documents are inextricably linked and subject to the regional and national plan for the "management of diversity", and diminish the veracity of respondent's defense. (DE 25's gov. Ex. 3 at 30-34; stamped gov. Ex 4,5)

Regardless, the "number one critical element" is nationally applicable and thereby, the district court issued a compelled disclosure order that was erroneous by its over-exclusionary nature. (DE 39 at 7) Additionally, the record shows that respondent placed particular pertinent documents, that were not supplied to petitioner, on the court's record on file after the date that the respondent claims to have come into compliance with the court's disclosure order. (Appellant's br. at 35, 41, 46; "Fax dates") Moreover, as pertaining to the locale of the complaint; "the specific (dis) proportional under-representation and accompanying over-representation, that plaintiff refers to in rebuttal, (ROI, Ex. 4, 8) is manifest." As such, it is shown in DE 24's Gov. Ex. 2 at 13.

As stemming from the facts and the totality of the circumstances; the Federal actor is thereby in effect dictating to petitioner and his like as to which positions that they will be allowed to fairly compete for. And such determinations are made by the respondent's reference and regards to proscribed factors. (Richmond v. Croson)

Mindful that respondent has promulgated that it's affirmative action/preference programs are specifically for diversity for the sake of diversity as opposed to a response to any pattern or practice of unlawful discrimination; petitioner thereby maintains that such purpose, regardless of political consideration, constitutes unlawful grounds for a Federal actor's implementation of such programs. (Croson)

Moreover, how can the Executive assume authority over what by divided and separate power is the authority of Congress; as in making rules for the government. And then

do by directives, policy and programs what Congress itself is prohibited in doing; as in passing any bill that would deny any person equal protection of the laws.

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING THE WRIT

As resulting from the aforementioned complaint and in lieu of the EEOC, the defendant conducted its own investigation of itself and issued its report thereof as prepared by its own contractor. (DE 25's Ex. 1; the ROI)

As contained therein, defendant admits to the occurrence of a "promotion plan violation" and to "your rights as an applicant were violated." And that "we agreed that the park made error when we omitted your name from a certificate;" (Id. at 8, Ex. 20 at 7) (ROI Ex. 1 at 7, Ex. 20 at 4, 7)

The same report goes on to show that the position in question was initially advertised at the GS-7/9 grade levels. (DE 25's Ex. 1; the ROI's Ex. 10 at 1) In response thereto, both petitioner and the selectee applied. (ROI Ex. 15, 16) Thereupon, the defendant found this petitioner to be qualified for the position at the GS-7 level while finding the selectee to be "NOT Qualified (Document Reason)" as in the selectee "lacks qual(ification) of exp(erience) for (grade levels) 6/7/9". It is also specified on this same form; that petitioner is "Qualified" "C"(ompetitively) at the GS- "5/6/7" levels "based on educ(ation)" and "lacks qual. of exp. For 9", and that the selectee is only "Qualified" "C(0mpetitively) (at the GS-) 5 (level)". (ROI Ex. 12)

Thus, the selectee was not qualified for the initially advertised position that subsequently was re-advertised at the lower entry grade level.

Being mindful that this same qualifications determination/evaluation form is completed by the "Personnel Management Specialist", (ROI Ex. 7 at 3, 4, 5) prior to the indisputably unnecessary existence of the

subsequently convened, contrary to policy, rating/ranking scheme panel, (ROI Ex. 9 at 6,7) whose indisputable purpose was to subsequently screen out already known to be qualified applicant(s) as per the illicitly (DE 28's, Gov. Ex. 3, at IV-4-17, Appellant Brief at 10) "...developed...rating guide..." in order to preclude for some their certain referral for consideration for selection and as done via this same directed, "crediting plan", point/score assignment instructions scheme. (ROI Ex. 1 at 6, Ex. 6 at 5, Ex. 20 at 1)

Nevertheless, as per the ROI, Ex.12 form as documenting the Personnel Management Specialist's findings, therein, it is most notable that the basis for the determination of the qualifications of the petitioner is specifically cited. In contrast, for the selectee there is the complete absence of any type of citation as regarding the basis for the determination of her qualifications. Thereby, in context, it can only be inferred that the selectee was listed as qualified, and only at the GS-5 level, as based on experience alone and not, as her application shows, as based on education, as it is lacking.

Additionally thereby, in context and for purposes of consistency it can also be inferred that petitioner was listed as qualified at the GS-5, 6, and 7 levels as based on experience in addition to the specified educational attainment, as it is specified that as pertaining to experience; petitioner only "lacks qual. of exp.for 9".

The above analysis stems from scrutiny that is most apparently absent on the part of the lower courts.[1]

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[1] Moreover, "21. As regarding the rejected plaintiff, as a... competitive eligible, it is notable; that the defendant had previously found plaintiff, to be qualified at the full performance GS-9 level, for this same series but higher full performance grade level:

"Position: Concessions Management Specialist, GS-1101-9/11" job at a different National Park, approximately a year prior to plaintiff's application for subject same series Concessions Management Specialist, GS-1101-7/9 position at ENP.

As regarding the prior referenced form, pertaining to qualification levels, (ROI Ex. 12) it is indisputable that the defendant knew of the qualifications status of the petitioner and selectee, as among the original applicants, prior to this forms completion and prior to the re-advertisement as indicated by the record. (ROI Ex. 7 at 4, 5)

REJECTION

Thereafter, at some point in time prior to the re-advertisement, petitioner's known to be fully qualifying application was incontrovertibly rejected for referral for consideration for selection. Whereas, at no time, nor at any grade level was petitioner's known to be qualified at multiple levels application ever referred to any selecting official for consideration. (ROI Ex. 9 at 8)

Nevertheless, as regarding the initial job vacancy announcement, this rejection only represents the first of the multiple rejections for referral for consideration suffered by petitioner as regarding this same single position.

ARTICULATED REASON FOR REJECTION

As it is specified that: "...the Defendant has met is (its) burden in articulation a...non-discriminatory reason for Plaintiff's non-selection. Based on an objective evaluation, one that applied equally to all promotion eligible candidates, the Plaintiff's numerical rating placed him beneath the cut off for certification." (parenthesis word added) (DE 35 at 12/13)

Nevertheless, as specifically related to petitioner's fully qualifying application and the initial job vacancy announcement, the district court refers to a numerical rating that was not in existence when petitioner was rejected even though he was found to be fully qualified for referral for

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This information is shown in the record on file as contained therein as page 26 of plaintiff's 46 page ENP application..." (ROI, Ex. 15) (Brief of Appellant at 23, 24)

consideration as determined by the defendant via its use of the controlling Office of Personnel Management (OPM) standards of measure, for this continuously existing, as in not subsequently cancelled position that petitioner submitted his application for. (Qualification Standards, Operation Manual, DE 24's Ex. 3)

Thus, the district court is erroneously relying on and referring to an ex post facto and inofficiously designed numerical rating scheme that surfaced, contrary to rules, (ROI Ex. 9 at 5, 6, 7, 8) as a means to illegitimately screen out non-preferred applicants (DE28's GOV. Ex. 3 page IV-4-17; selective factors) and such was applied to the subsequent and distinct job announcement for this same position. This is also to state that the re-advertised position lowered the initial entry grade level and thus the qualification requirements. Moreover, neither the selectee nor this petitioner applied for this newly modified, for purposes of accommodating the lesser qualified, position. (ROI Ex. 10 at 7 and Ex. 7 at 4,5)

Thus, the articulated reason supplied for petitioner's rejection/"non-selection" only came into existence after petitioner's rejection as the record shows.

CIRCUIT COURT AFFIRMATION OF DISTRICT COURT'S DECISION

As contained within the PER CURIAM decision it is stated: "...that under either of the methods employed by the park to decide which applicant's to forward to the selection official for review, Walsh (petitioner) failed to make the cut that would allow him to proceed. (R. 1-25 at Ex. 6 at 12-14)" (Circuit Ct. decision basis at 3)

Thereunder, the circuit court is simply referring, in its "either of the methods employed..." statement, to an alternative form of the same game ex post facto numerical rating scheme, as previously referenced by petitioner, and that was used to evaluate all applicant's that the defendant considered/assumed to be applying for the subsequently re-advertised and newly modified same series position.

Nevertheless, the initial position advertised was still continuously existent and the applications submitted in response to same were still valid and thereby required submission for referral for consideration purposes if the applicants were known to be qualified.

Subsequently, thereby, defendant states: "In determining which candidates to refer to the selecting official, a cut score was established...If one method screens out minorities, women, or other targeted groups, the alternative method is used.

...Method 1 (natural break) was the cut score chosen in lieu of Method 2 (average break) in an effort to promote equal opportunity at the GS-5 grade level. For the GS-6 and 7 grade levels, method 2 (average break) was used.

...Accordingly,...Five applicants (including yourself) were eliminated from being referred to the selecting official..." (ROI, Ex. 20 at 2, 3)

Thereby, Method 1, which is only engaged as concerning preference eligibles, allows for a lower cut score than Method 2. (ROI Ex. 1, Ex. 20) As resulting therefrom these numerical rating schemes; three out of four competitively eligible women were referred for consideration, as only three competitive eligibles are allowed to be referred for consideration under these ex post facto schemes, and all four competitively eligible and qualified men were screened out from referral, (ROI Ex. 14) "in an effort to promote equal opportunity". Nevertheless, petitioner is also seeking prospective relief.

As regarding the GS-6 and GS-7 levels' numerical rating scheme, the district courts report states: "The Plaintiff's ranking also rendered him ineligible for consideration at the GS-6 and GS-7 levels. (M.S.J. Ex. 13 at 4) Under these particular facts, the defendant has met its burden in articulating a. ... non-discriminatory reason for Plaintiff's non-selection." (Underline emphasis added) (DE 35 at 12)

Nevertheless, the record on file is totally devoid of petitioner's "ranking" as pertaining to the GS-6 and 7 levels.

As petitioner was the only competitive eligible that was qualified to be "ranked" at those levels. Unless of course, petitioner is ranked Number 1. Additionally, the same can be said of the prior referenced and subsequent use of "Method 2 (average break)...For the GS-6 and 7 grade ("cut") levels..." as applied to petitioner, as the only qualified competitively eligible for promotion applicant rated and who nevertheless was subject to and/or created the "average ("cut") break", and thereby was retroactively disqualified.

The above is relevant to the defendant's cited Merit Promotion Plan and as stated therein: "All...be rated to ensure...they meet...qualification(s)...Regardless of the number of the applicants, qualitative distinctions must be made among the promotion eligible in terms of relative merit and ability..." (DE 25, Ex. 1 thereto, as the ROI's Ex. 21 at 4 and on missing page 5) and plaintiff's brief at 45. (emphasis added)

Accordingly, the district court was in error when it stated that: "Based on an objective evaluation, one that applied equally to all promotion eligible candidates,..." (DE 35 at 12, 13) as, other than petitioner, there was no "all...candidates" competitively eligible for promotion at the GS-7 level, as out of 19 applicants only the petitioner was competitively ("C") eligible for promotion at the GS-7 level. (ROI, Ex. 12) As in: "Walsh, John J. –Qualified C—5/6/7". (ROI, Ex. 12 form)

Thus, at the GS-7 level: No "qualitative distinctions must be made among the promotion eligible in terms of relative merit and ability..." when there is only one promotion eligible and your purpose is to reduce the qualified applicant pool to the "top three" for "each grade level". (DE 24's Ex. 4, 5—"Top Three", ROI Ex. 5 at 5, 6—"certificate for each grade level")

Moreover:

"Q. At what grade level did he apply

A. He applied at the 7 level…

Q. Okay. And at the 7, at the 6 and 7, Mr. Walsh was the only candidate. Okay.

A. So----." (ROI Ex. 7 at 8, 12)

Additionally, neither the words "objective" nor "equally" are to be found in the record outside of the counsel for the defendant's use and the court's improper and ultimately baseless adoption of same.

Moreover, as regarding the court's errors and thereby, as the prior deposed "GS-13 Personnel Officer" for the approximately 250 employees Park stated: "…in accordance with the merit promotion plan, is if we have less than 10 promotion candidates we just go ahead and refer…after we do the basic quals. We do not go through and rate and rank and/or hold a panel…" (ROI Ex. 9 at 7)

Accordingly, out of 19 total applicants only 8 (including petitioner) were found to be competitively qualified as promotion candidates, and of those 8, excepting petitioner, all were only qualified at the GS-5 level. (ROI Ex. 13 at 1)

Thus, what the court cites as "applied equally" to petitioner is not applicable to petitioner, (DE 35 at 12, 13) and thereby not material for purposes of rejecting petitioner.

Moreover, as pertaining to the court's claimed "objective evaluation", the record does not reveal the designer of the evaluation, nor the author of the following:

"A. The KSA's…listed in the vacancy announcement, (nor) ratings levels…developed for those KSA's (as)…the rating guide…used by…panel…" as the "criteria" that the "candidates were rated against." (ROI Ex. 7 at 7)

Thus, the objectivity of the designer/author of such is not capable of establishment. And the selecting official acknowledges no involvement as: " I was simply given a cert that had names on it." (ROI Ex. 5 at 5) and it cannot be

established that the "criteria" was objectively designed as not to favor any particular protected group or individual member thereof. As the referral for selection results emanating from this criteria evidences the opposite. As in all four competitively eligible and qualified for promotion male candidates were screened out for referral for consideration by the criteria and inofficious selection process.

Thus, the district court is in error when it stated: "...there is no evidence from which a rational fact finder could conclude that the proffered reason for his non-selection; i.e., that Brice possessed superior qualifications based on objective criteria, was in fact based upon a policy designed to discriminate against white males..." (District Court's Report, DE 35 at 16)

Moreover, petitioner maintains that no concluding is necessary, as only a "could find" as based on what is "somewhat less that the preponderance of evidence" is necessary at the summary judgment stage of deliberation. The same applies to the above's "was in fact based". And this immediate matter is primarily about the non-referral for consideration and not necessarily about the ultimate non-selection for the position. As in: "A. No. the selecting official never even received his name, so that wasn't even—he didn't even have the opportunity to consider him. He did not get...on the cert." (ROI Ex. 9 at 8) (emphasis added)

Thereby, petitioner maintains that this in all about equal opportunity and such has been denied petitioner and his like, and that if the identities of the petitioner and the selectee were cross assigned this case would be non-existent.

As also regarding the "objective evaluation", that the court speaks of as in and derived from the locally implemented and controlled scoring instructions/ "KSA definition form"/ "Crediting Plan", which directs the rating panel members on the number of points to assign; such is totally absent from the defendant's controlled Report of Investigation, (ROI; DE 25's Ex. 1) and the record on file.

As such: this absence 1.) indicates most importantly, that the judgments/decisions rendered in this instant case by the lower courts lack foundation as there is no existent underlying basis, as inherently required, from which the courts citation of "particular facts...objective criteria" stems from. And 2.) this absence indicates the absence of good faith on the part of defendant. (ROI, Ex. 1 at 5)

Thereby, the circuit court's reasoning for its decision as in "Walsh failed to make the cut that would allow him to proceed' is simply based on a number, not attested to, and lacking underlying factual basis that thereby precluded the court's establishment/determination of "admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for not hiring plaintiff."
(Circuit Court at 3)

This is to say that on this matter, petitioner is not presenting a fact question to this Court that the lower courts have decided on. Rather, this is to state that the entire basis, for the lower courts decisions, is inherently contingent upon the creation of non-existent in the record "facts". (DE 35 at 12) This is also to state that it is erroneous for the lower courts to devine the existence of material facts that: "explain how the score relates to the experience required":, (ROI Ex. 1 at 5) when such specific explanation has no basis in the record on file as absent therefrom and that their decisions hinge upon. Nevertheless, such specific explanation does exist in the record not on file, as among petitioner's court listed exhibits. (As to petitioner's attempt to put the voluminous content of the actual listed exhibits on file see Appellant's br. at 18)

This is to state that the basis that directs the assignment of the scores is absent from the record and such specifies the multitude of numbers to be granted with specificity in order to arrive at a totaled number as based upon also absent from the record rating criteria. Thereby, what is derived from such absences cannot constitute "admissible evidence sufficient to raise a genuine issue of

fact..." due to insufficiency. Thus the circuit court is in error. Moreover, as previously shown and as revealed in the record, petitioner was not to be made subject, at any time, to the "cut that would" preclude petitioner from proceeding, especially at the GS-6 and 7 levels.

Nevertheless, the lower courts divine the results to be "Based on an objective evaluation, one that applied equally to all..". This occurred even though petitioner made known to the courts, that petitioner was in possession of the controlled rating scheme's explicit directions/instructions that were required to be used by the panel members in their point/score assignments. (DE 39 at 11, 12; Plaintiff's objections to the Court's Report, Appellant's Brief at 13)

Moreover, for this entry level position, it is stated in plaintiff's objections that: "It is also notable, that due to the confines of the defendant designed scoring, that no qualifying for referral credit can be granted for any and all formal education, and virtually no amount of sufficiently qualifying for referral credit can be given for any non National Park Service experience either, regardless of how most pertinent and directly related that experience may be to the position. (See Report, page 12) "Plaintiff...had very similar experience but not specific experience," etc.) (DE 39 at 12; objections) (operative words: entry level and this job was government wide not just NPS wide for applications from.)

To elaborate, as from the testimony of the only panel member who agreed to testify to the defendant's investigator, who also happened to be the only panel member who was qualified sufficiently enough to be considered to be the position "subject matter expert" and who was also the only panel member that granted a sufficient number of points to petitioner for purposes of allowing the referral of petitioner for consideration, he stated that petitioner had: "similar type experience that this job would require but, again, it wasn't the specific experience that the KSA seemed to call for," (ROI EX. 6 at 8) as in the "KSA's" controlling and non-

validated "crediting plan", that the defendant's Report of Investigation selectively omits.

Also, as pertaining to this matter of an "objective rating procedure utilized to assess all candidates equally", (DE 35 at 8; district court's report) plaintiff pointed to a glaring disparity in the assessment findings as revealed by (this only same) panel member who spoke on the record:

A. "...,but I know our scores were pretty much in line all the way through all of the applicants.

Q....panel member B, which is yourself gave (plaintiff) a score of 57, ... A...gave...37, C...gave 38...there's clearly a big gap...(57 qualifies for referral)

A. Okay. I did not recall that." (DE 27, page 9, DE 39, page 8)

Nevertheless, the court claims "insufficient" inference/evidence on this gap matter. (DE 35 at 15) "...context of an EEO investigation this absence of testimony (of other panel members) is specifically referred to as "Adverse Inference"." (appellant Brief at 14, 15) (See "29 CFR Section 1614.108; Investigation of Complaints esp. (3) (I)"

Nevertheless, the Circuit Court goes on to state: "Walsh (petitioner) failed to make the cut that would allow him proceed. (R.1-25 at Ex. 6 at 12-14) In Turnes, we stated that an "employer need only offer admissible evidence sufficient to raise a genuine issue of fact as to whether it had a legitimate reason for not hiring the plaintiff. (admissible: emphasis by petitioner)

As regarding such "ADMISSIBLE evidence" in prior turn petitioner stated: "For false signatures of the panel members see DE 27 at 10...In regards to fact questions arising from false signatures; DE 39 at 9".

Nevertheless, even after acknowledging the false signatures, the district court dismissed same as not "material." (DE 35 at 16)

Thus, petitioner maintains that the lower courts erred again as in regards to the "admissible evidence" used to attest to the actual beliefs of the non-deposed panel members as to whether petitioner should have been allowed to proceed to the referral for consideration stage. Moreover, affidavits from these non-deposed are also lacking, and the testimony of the only deposed panel member, as regarding his direct knowledge of the other panel member's evaluation of petitioner, is in conflict with the evaluation scheme's average of recorded scores, that, as evidenced, are not "material" nor valid for rejection.

Moreover, as regarding the evaluation scheme and its by definition; use of "selective factors" and as stated in the controlling Qualification Standards Operation Manual (DE 24's, Ex. 3): "Selective factors must represent knowledge, skills, or abilities that are essential...and cannot reasonably be acquired on the job during the period of orientation/training customary for the position being filled.: (emphasis added), DE 28, Gov. Ex 3 at IV-4-17, Appellant Brief at 10)

Nevertheless, as regarding this instant case's KSA's, which serve as the screen out device, subject KSA's are indisputably in direct conflict with the above: " and cannot reasonably be acquired" Section as pertaining to this entry level position as the following KSA examples indicate: "...address your experience interpreting concessions management guidelines...monitoring and reviewing concessions publications and brochures for conformance with policies and guidelines...: (ROI Ex., 10 at 2, 8)

This is to state that, for an entry level position, it is absurd to require any applicant to have the overly specific NPS experience that the above demands in order to receive sufficient credit for referral purposes.

In sum, the requirement of "specialized experience" in lieu of "general experience" as a screen out factor is

specifically contrary to the rules. (See petitioner's Petition For Rehearing at 9-14)[2]

Nonetheless, the lower courts, at all times, fail to ever mention or reference the controlling qualification standards, and the district court states that petitioner's claims of violation concerning the "Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures" is wholly devoid of evidentiary support." (DE 35 at 18) Unless of course for preference eligibles; the only "guidelines" that are "uniform" are the results of preferential selection, regardless of the non-qualifications of the selectee.

SELECTEE'S NON-QUALIFICATIONS

Petitioner maintains that the selectee was not qualified for rating/ranking, or for purposes of referral for consideration at any advertised or re-advertised grade level for the subject position.[3]

Thereby, in response to petitioner's initial complaint the following has been stated in regards to the multiple step screening process: "...GS-1101-5/6/7/9 and the merit promotion process: Step 1-...application (is)...determined...qualified in accordance with the Office of Personnel Management's basic qualification requirements.

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[2] "Moreover, it is obvious that the panel's rating criteria instructions, that the court knows are absent from the defendant's controlled ROI and also totally absent from the record, must be incompatible with the controlling qualification standards. See DE 7 at, N1" (*Appellant's Brief at 41)

[3] "In sum, the record of the selectee's background does not conform with the qualification requirements of the position as indicated by the content of the salient record excerpts. Moreover, the customized process used to certify the qualifications of the selectee is invalid, along with the criteria put forth by the defendant for the determination of same." (Appellant's Petition for rehearing at 7)

Step 2-...application (is)...rated and ranked against...(KSA's)... We are unable to provide you with the crediting plan which describes levels of experience because this is considered "examining" material..." (ROI, Ex. 20 at 2)

Thereby, as per "Step-1": some applicants are immediately disqualified thereunder. Accordingly, the applicant does not advance to "Step 2". (ROI Ex.(s) 12,13)

Therein, as concerning the selectee and the GS-5 level and as regarding "Step-1" of the "process"; and it is indicated by the rules and by her application (ROI Ex. 16) that the standard of measure for the determination of qualifications is to be under the "General Experience Requirements" (DE 24's Ex. 3; U.S. Office of Personnel Management, Qualification Standards Operating Manual, Group Coverage Qualification Standard for Administrative and Management Positions, at IV-A-15)

As shown therein it is specified that "3 years (of) General Experience" is required. Therefrom it is also stipulated that: "general experience is 3 years of progressively responsible experience...such experience may have been gained in administrative, professional, technical, investigative or other responsible work. Experience in substantive and relevant secretarial, clerical or other responsible work may be qualifying...Experience of a general clerical nature (typing, filing, routine procedural processing, maintaining records or other non specialized tasks) is not creditable." (DE 24's Ex 3 at IV-A-16)

As pertaining to the above it is specified that at the time of application that the selectee, Ms. Brice, was a "secretary, GS-318-7 Everglades NP" (ROI Ex 14 at 1) and as contained on the selectee's application it is stated: "Job Title-Secretary GS-318-07" and that her prior position up until 11/94 was: "Environmental Education Clerk- GS-303-05" (ROI Ex. 16 at 1)

Additionally, as contained on the narrative section of the application, the selectee describes her, at the time application, position to be that of 'Executive Secretary':.

(ROI, Ex. 16 at 5) Nevertheless, as per the "Roster of Employees" and the "List of Selections", no such title is existent. (ROI Ex. 22, 23) As related thereto it is stated that:

"prior to her selection (she) served as an executive secretary to...Belli, Concessions Department Superintendent at ENP...Belli is the immediate supervisor of...Beneditti, the selecting official..." (Appellee Br. at 21; FN 4)"[4]

Nor did Belli agree to be deposed as suggested by Petititioner and in order to avoid adverse inference. (ROI. Ex. 8 at 13)

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[4] In response petitioner stated "...the title "executive secretary" is inofficious as in: the selectee's self styled title...non existent in the record and in conflict with her actual; "job title of secretary...318 (series) i.e., "secretary OA", (Office Automation) and also not consistent with...prior position as a "clerk...303, (miscellaneous clerk and assistant), Environ. Ed. Clerk", (ROI Ex. 16, at 13, Ex. 17 at 1) [See Qual. Stds Manual at IV-A_16 for non conforming experience as in not creditable for qualifying]

As to "Belli, Concession Department Superintendent, no such title exists on the record, as before he was the "Assistant Superintendent'...Park Manager...Deputy Superintendent"...

As to the "Concession Department", it is non-existent, however, there is a "Division of Concessions Management' at ENP... As to Beneditti; he was the "Chief, Concessions Management, (division) for the four southern parks...'...who is "responsible for direct supervision of one Concessions Aid position..."

Accordingly, there is no "Concessions Department Superintendent at ENP", regardless of the defendant's counsel's claim

As concerning the above, Defendant's footnote 4 at 21 is apparently in response to plaintiff's brief at 54 and as stated therein:

"the Chief, Concessions Management, as per his testimony, gives no indications of the quality of the selectee's alleged to be specific concessions management specialist work while she was working as a secretary to another party and apparently not under his supervision..."

...Defendant's foot note evidences another multifaceted fabrication..."" (Appellant's Petition for Rehearing at 15, 16)

Nevertheless, as concerning the prior referenced "Experience Requirements" as: "general experience is 3 years of progressively responsible experience...such experience... in substantive and relevant secretarial...work may be qualifying as long as it provided evidence of the...(KSA's) necessary to perform the duties of the position..." (DE 24's Ex. 3 at IV-A-16) "...the record is devoid of any real factual indication of selectee's length of a "substantive and relevant" experience as pertaining to this position, and as even the inferences that could be conduced from the record are inconsistent, non-correlated and in conflict with themselves and contrary to other parts of the record. (Pl. brief at 2, 3, 4, 9-17, 19-23, 30, 35-37, 39, 41, 45-54; Pl reply brief at 7-9, 13)" (Petition for Rehearing at 10) Thereby, as regarding the selectee's application, (ROI Ex. 16) no factual indication of time, as expressed in years of required experience is shown.

This is to state that allegedly, the selectee was occupying two separate positions concurrently. Moreover, and importantly, the selectee's application gives no indication of when she commenced her performance of same concessions management specialist duties. Additionally, the selectee gives no indication of the proportion of her time that was dedicated to such duties.

Moreover, as concerning specific KSA's, only one of them is mentioned by the selecting official as regarding the selectee's relevant experience. And as regarding such the selecting official stated that: "She had been working for approximately nine months on incidental business permits" (while serving as a secretary to another.) (ROI Ex. 5 at 7)

Nevertheless, the "nine months" is less than the required "3 years of progressively responsible experience... in substantive and relevant secretarial...work." This is also to state that (KSA's) are plural.

On her application narrative she specifically lists what the rules list as "not creditable" for qualifying.

Thereafter, she separately makes a multiple and redundant list as regarding "Incidental Business Permits...IBP's" etc.

In sum, as regarding the "provided evidence of the (KSA's)..." (DE 24's Ex. 3 at IV-A-16, ROI Ex. 16) and in relation to evidence as: "...All the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. ..." (Blacks 5th Ed. At 498) In relation thereto, the record on file, including it's Report of Investigation, by no means shows that the selectee was qualified. And as regarding such record on file it is more likely than not that a job "FIX" as abundantly evident, occurred.[5]

Thereby, petitioner maintains that the lower courts cannot divine into existence "facts" that are by legal definition non-existent facts, especially when such non-existent "facts" are considered to be material to the lower courts for decision making purposes in the summary judgment proceeding. In sum, the record shows that this instant case screams mendacity and prevarication, some of which petitioner has not ever touched upon and may not get to as it is so pervasive.

THE LAW AND ERRORS OF THE LOWER COURTS AND THE DEFENDANT

The circuit court states that this case is a: "failure-to-hire claim". (at 2) Whereas, petitioner stated that: "this

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[5] Also, the defendant's counsel failed to supply petitioner with the same record on file that it placed on the court's record. Among the non-supplied documents is DE 24's Ex. 3 at IV-A-16 and its reference to "not creditable" experience, additionally, the investigator omitted the Qualifications Standards from his report. Also, as a key point, if the 3 years of experience are gained via secretarial work, they must be "substantive and relevant" as to provide evidence of the KSA's pertinent to the specific position and such is not required when the experience is gained via "general" administrative, professional, etc. work. Also, the selectee had served less than 3 years in said secretary position.

matter is primarily about the referral for selection process and whether or not a "rational fact finder" could find "sufficient evidence" of discriminatory disfavor of plaintiff and/or discriminatory favor by defendant towards the selectee." (DE 39 at 20, emphasis existing)

Additionally, "Nevertheless, defendant virtually ignores that: "this is...the referral for selection process...as the final selection process is a distinct (and distant) issue, as is; the...requirement to hire anyone...as the process is the main issue..." (petition for rehearing at 1)

The circuit court also states: "When the plaintiff relies on circumstantial evidence to establish his claim in a Title VII discrimination case, the district court uses the burden shifting framework established in McDonnell Douglas v. Green..." (underline added, at 2)

As related thereto, the district court states: "Once this initial demonstration under rule 56 (C) is made, (absence of genuine issue) the burden of production, not persuasion, shifts to the nonmoving party." (DE 35 at 4, 5, parentheses added) Thereafter, it is stated that: "The Plaintiff has failed to produce any affidavits, depositions,...or admissions tending to support a reasonable jury verdict in his favor." (DE 35 at 18, underline added) Petitioner responded: "At this juncture...what is relevant is the record on file" (not the file producer or source) (br. at 6).

Nevertheless, the circuit court has previously stated: " Rather, once the defendant has met its burden of production the McDonnell Douglas/Burdine Framework becomes irrelevant; the sole inquiry is whether the plaintiff successfully carries the burden of persuading the trier of fact...Hicks..., 113 S. Ct. at 2747-48..." (underlines added, Walker v. Nation's Bank...11th,...Nos. 93-3380, 94-2134, June 12, 1993, appellant br. at 27)

Thus, the conflicting words in the above are: "uses" v "irrelevant" and "production v. persuading".

The district court has also stated that: "The Plaintiff has not met his burden in proving...reasons pretextual for unlawful discrimination..." (underline added, DE 35 at 18)

The above was advanced erroneously and thereby precluded, unlawfully, petitioner's constitutional right to a jury trial. As in the word "proving" which by legal definition means: "To establish or make certain..." (Black's 5th ed. At 1102) This is to state that by law, it is improper to apply a "proving" standard as regarding summary judgment. As by law, only the showing of the existence of a genuine issue is required as per Anderson v. Liberty Lobby, Inc. 477 U.S. 242 1986, pp. 247-252.

Similarly and erroneously the same court has also stated: "...there is no evidence from which a rational fact finder could conclude...that...reason for his non-selection; i.e. that Brice possessed superior qualifications based on objective criteria...(DE 35 at 16)"...court ...erred in its requirements ...that...fact finder reach conclusion...at this stage. Accordingly,...Anderson v. Liberty Lobby...stated that: "it is true that the issue of material fact required by...56 (c) to be present to entitle a party to proceed (477 U.S. 242, 249) to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the...dispute be shown to require a jury...to resolve...versions of the truth at trial: 391 U.S., at 288-289". (Appellant br. at 8, underline added)

The district court has also stated that: "...the Plaintiff fails to show...discriminatory intent..." (DE 35 at 17, 18, underlines added)

Nevertheless, the same court has also stated that m: "In...discrimination cases based on direct evidence, intent...arises...without...inference..."161 F.3d 1318, 1339 (11th Cir. 1998) In contrast,...claim based on circumstantial evidence, a plaintiff must prove discriminatory motive...Teamsters v. U. S. 431 U.S. 324, 335 n. 15...(1977)." (DE 35 at 6, underline added)

As regarding the court's application of "intent" to petitioner's case, the district court, in context, presented the above erroneously. Moreover, as to "intent" as in it's: "Being a state of mind, is rarely susceptible of direct proof, but must ordinarily be inferred from the facts..." (Black's, 5th ed. At 727)

Nevertheless, the lower courts are in error, at best, by at all times failing to mention, nor reference, nor address petitioner's repeated and emphatic claims of the indisputable existence of **MOTIVE** to discriminate and as put into play by highest levels of the department and as incontrovertible.

Discriminatory Motive and Practices

"...favorable evaluations are reflected on management's performance plans in regards to "diversity" achievements as...found on "form number DI-2002" (Appellant's br. at 3)

As regarding such and as stated in the record on file by petitioner:

"40...Dept. of the Treasury Memo of...Commissioner of the I.R.S., Michael Dolan, in regards to performance plan evaluations specifically pertaining to diversity and the...suspension thereof Issued Aug. 1996..." (DE 18 at 11, and as a response to the Adarand v. Pena decision)

"10...as pertaining to motive; Mr. Beneditti's annual evaluation relates to...success in...affirmative action...preference programs...same can be said with even higher accountability levels for his immediate supervisors." (id.9)...[as from ROI Ex. 8]

12. Lower qualifying "cut score" applicable only for minorities and women. (id, 11)

13. Improper utilization of "applicant's background survey" information during the qualifying for referral for selection process...survey identifies proscribed factors particular to applicants...

14.Exclusionary "skill banks and referral pools" based on proscribed factors. (id. 12)

...As an indisputable fact that a lesser qualified applicant was referred for selection...and plaintiff was rejected for referral (for consideration) (DE 25, at 3, Nos. 5, 8)

Thus, when this material fact is coupled with the at all times indisputable fact; that the supervisor of the selecting official is held to high accountability standards as regarding diversity achievement; it is by definition a genuine issue of material fact under these circumstances. (and as to the non-deposed supervisor made unavailable)...thereupon, connect this with..."Adverse inference"...(as specified) in 29 CFR 1614.108...EEO investigations..."" (Appellant's Br. at 3, 4, which excerpts from ROI. Ex. 8)

Nevertheless, in regards to much of the preceding, which was presented prior to the district courts Report and Recommendation, the district court also states that: "Plaintiff has neither produced evidence nor designated specific facts which, if submitted to a jury, would show the existence of material issues..." (DE 35 at 18)

Petitioner's point here is that, in the above, the operative words are: "if submitted to a jury" and as regarding such, the lower courts, as previously stated, refuse to acknowledge the existence of **MOTIVE**, as the presence of motive under the circumstances of this instant case makes manifest and undeniable the strong potential of the rational jury's': "**COULD**" find for plaintiff.

Thereby, it could be said: that awareness of said potential explains the evasion of the genuine issue.

Prior to the court's Report (DE 35) petitioner had also stated and specifically in regards to motive: "Look at the number one critical element of the performance plan for selecting officials and members of management...this material fact concerning the number one critical element of diversity achievement...can be found in the annual evaluation...relates to success in achieving diversity

goals...the evidence directly proves the fact that...officials have...motive...to favor "women and minorities"...**The "fact" is motive and the fact is a material fact.** (DE 27 at 6, 7)" (br. at 15)

Petitioner has also previously stated that as stated in Teamsters, 431 U.S. 324, 325: "Central focus...is always whether the employer is treating "some people less favorably because of their race...sex..." "...as with the term, "number one critical element, the Report, in its entirety, fails to find plaintiff's use of the word: **MOTIVE**. ...(DE39 at 14) (emphasis original)

"...SCREENING and selecting personnel...process will focus on...EO... special emphasis programs... superintendent's selection process...affirmative action staffing plan...no personnel...offered employment until required review..." (DE 27 at 12, DE 39 at 17 (br. at 16, emphasis existing)

Also, as regarding the selection of supervisory personnel it is required that some be subject to: ""**SCREEN-OUT**" of those perceived to be limited in their ability or "skill in Affirmative Action" (DE 27 at 12, 13)"" (emphasis original)

...Accordingly: "The trial court's function at this juncture is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial."...(br. at 1) (pp. 247-252, Anderson v. Liberty Lobby, Inc., 477 U. S. 242 (1986)"

Additionally, this matter primarily concerns the existence of discrimination <u>prior</u> to the ultimate selection. This is to state that rejection for referral for consideration precludes selection.

Moreover and **MOST IMPORTANTLY**, and as regarding the erroneous and premature requirement for an "intent" <u>conclusional</u> finding, such is misapplied as the <u>HICKS</u> standard controls as in: "The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may,

together with the elements of the prima facie case, suffice to show intentional discrimination" Hicks,--U.S.--, 113 S. Ct. at 2749. (Appellant br. At 27 parenthetical original)

And as also evident is that the defendant did not believe that the rejected petitioner was not sufficiently qualified and that the selectee was qualified as: ""The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perception of his performance. Billet v. CIGNA Corp.,..." (Holifield v. Reno, No. 95-3289, July 2, 1997 at 7)"" (Petition for re-hearing at 3)

Conflicting Eleventh Circuit Decisions

As per "46 Mercer L Rev. 1321" (1994):

> "...in Batey v. Stone. A race discrimination case...failure to promote...plaintiff, a white female...The primary litigation issue concerned the creation of a new position (Fed. Gov.) on the theory (of)...the new job description...On appeal, the Eleventh Circuit Court reversed, finding that a material issue of fact remained as to whether the promotion decision had been undertaken with discriminatory intent. The court found that...since there was evidence in the record that (plaintiff)...was better suited for the new position. In short, the court found that the evidence raised the question as to whether the matrix utilized in filling the...position had been "fixed" to select a predetermined candidate, and thereby favor...(another) over the (plaintiff)."

"In Turnes v. Am South Bank, M.A....Eleventh Circuit reversed...finding that defendant...had no knowledge of this information at the time it rejected plaintiff's application...Accordingly, the court found that plaintiff's prima facie case stood unrebutted..." (ex post facto evidence) As in relation to Turnes, petitioner's record on file shows defendant's "unrebutted" response to present petitioner's 7 (2) (b) complaint. (DE 1 at 2)

As regarding analysis: "Among the most blatant fabrications of evidence lies the following:

"In this case, numerous ENP personnel involved have made sworn statements that neither race nor any AEP or other memoranda or policy either the selection official or the panel members in making the selection...see statement of material facts...plaintiff produces no evidence to refute..."(DE 25 at 18)

In response, plaintiff specifically refuted as follows: "Upon review, the words "AEP (Affirmative Action Plan) or other memoranda or policy" are not be found in their testimony, nor are they to be found in the questions from the investigator/examiner." (DE 27 at 10)

Moreover, no similar or like meaning words are to be found in context. Nevertheless, even after pointing out this genuine issue of material fact, which has great bearing on the ultimate issue, the district court responds: "...because of his own disbelief that "numerous ENP" personnel indicated that...nor any affirmative action plan factored in his non-selection...plaintiff's arguments regarding "inconsistencies" in the record is unconvincing...plaintiff's allegation that there is not evidence of "numerous ENP personnel" stating that neither race, nor any affirmative action plan factored in the decision process, is also refuted by the record. (Benneditti...at 8-9, Perez...at 15, Camp...at 9, Proctor...at 8)" (DE 35 at 14, 15)

The above clearly shows that the defendant has not shown the absence of a genuine issue of material fact that the District Court in "disbelief" apparently refuses to acknowledge. (See DE 39 at 13, 14, 15)

As regarding the federal defendant, the important point here is that there is the presence at the national, southeast regional and local levels of an affirmative action/diversity plan that is inherently based on proscribed factors that are in existence while there is no documentary nor testimonial evidence on file that shows the plan's non-applicability to the subject position in dispute."

(Reply Brief of Appellant at 11, 12)""

In closing, as a citizen and more importantly when petitioner acts on this matter: "he does so not for himself alone; but also as a "private attorney general,: vindicating a policy that Congress considered at the highest priority...(Newman v. Piggie Park Enterprises, 390 U.S. 400, 1968,) (Appellant's Motion for the allowance of more than 15 pages as concerning the petition for rehearing, at 2).

Thereby, I find that the distortions and inaccuracies, as especially concerning the facts of this instant case and as presented in the REPORT AND RECOMMENDATION ON THE MERITS OF PLAINTIFF'S CASE, (DE 35), to be unconscionable and as to be so numerous as to be unmentionable in their entirety.

As to the circuit court, its citation of Cofield v. Goldkist as the controlling precedent is so inexplicable as to be implausible. In sum, a classic case of selectively omissive reasoning. And finally, petitioner maintains that abuse of process is the hallmark means by which the practitioners of the "process" implement the achievement of the "essential and critical to the (defendant's) mission": "diversity".

In conclusion: "[D]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by congress is the removal of artificial, arbitrary, and unnecessary barriers to employment...Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox...provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes...also practices that are fair in form, but discriminatory in operation..." (Griggs v. Duke Power Co., 401 U.S. 424 (1971 at 4) (Petition for Re-hearing at 18).

In God We Trust
Respectfully Submitted,

John J. Walsh